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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 09-1546

[Filed January 8, 2010]

LINE CONSTRUCTION BENEFIT FUND, *Plaintiff-Appellee*,	)
v.	)
ALLIED ELECTRICAL CONTRACTORS, INC., *Defendant-Appellant*.	)

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 07 C 0950—**Rebecca R. Pallmeyer**, *Judge*.

ARGUED SEPTEMBER 21, 2009—
DECIDED JANUARY 8, 2010

Before CUDAHY, WOOD, and TINDER, *Circuit Judges*.

WOOD, *Circuit Judge.* Line Construction Benefit Fund ("Lineco") is a multiemployer employee welfare fund that receives contributions from employers pursuant to collective bargaining agreements ("CBAs") negotiated between employers and unions. The Southeastern Line Constructors Chapter of the National Electrical Contractors Association ("NECA") and the International Brotherhood of Electrical Workers, Local Union 474 ("the Union") operate under such agreements, which require participating employers to pay into the fund for all covered employees. Sometimes, when so many different entities are involved in an arrangement, all of the "T's" are not crossed as clearly as they might be. Essentially, that kind of problem is what gave rise to this lawsuit.

The question before us is the extent to which Allied Electrical Contractors, Inc. ("Allied"), a Tennessee electrical contractor and a member of NECA since 2002, is obliged to contribute to Lineco. Allied was not an original signatory to the 2005 CBA between NECA and the Union; it did not execute a formal letter of consent until December 7, 2006. Allied argues that this means that it was not bound by the CBA until that date. But Allied's argument treats as irrelevant the fact that its course of conduct—making payments precisely in accordance with the 2005 CBA from the start—demonstrates its assent to that agreement. We conclude, as the district court did, that Allied is liable for the deficiencies at issue here.

I

Lineco is a multiemployer welfare fund administered in accordance with section 302(c)(5) of

the Labor Management Relations Act ("LMRA") and the Employee Retirement Income Security Act of 1974 ("ERISA"). Allied began making payments to Lineco for Union employee benefits in 1993. In 2005, the Southeastern Line Constructors Chapter of NECA and the Union entered into a CBA, which among other things set forth the terms under which Lineco would receive contributions pursuant to a trust agreement that established the fund. The 2005 CBA changed the hourly contribution rate from $4.50 per hour (set by an earlier CBA) to $4.75 per hour for the work of covered employees. The 2005 CBA included a clause making it applicable to "all firms who sign a letter of consent to be bound by the terms of this agreement." The CBA took effect on December 1, 2005.

In keeping with the 2005 CBA, Allied began making contributions at $4.75 per hour in December 2005. It continued to do so until July 2006, when it missed a payment. Allied did not make a contribution for August either. In October of 2006, the Union barred Allied President Michael Eskridge from a NECA-Union negotiating session, because Allied had not signed a letter of consent under the CBA. On December 7, 2006, Allied executed a form letter of consent. Yet Allied failed to make the contributions that it acknowledged were due for December 2006, January 2007, and February 2007. In March 2007, Allied resumed payments as required by the CBA.

When the missing funds were not forthcoming, Lineco brought suit in the United States District Court for the Northern District of Illinois. Citing the CBA and the Trust Agreement, Lineco alleged that Allied owes it a total of $138,605.25, representing the delinquent contributions for July, August, and

December 2006, and January and February 2007. Allied moved to dismiss Lineco's action for lack of standing or, in the alternative, for partial summary judgment; Lineco responded with a cross-motion for summary judgment. On November 26, 2008, the district court dismissed Allied's motion and granted Lineco's cross-motion for summary judgment. Later, on January 29, 2009, it entered judgment requiring Allied to pay Lineco $200,816.36, the amount of the delinquent payments plus interest, statutory liquidated damages, attorneys' fees, and costs. Allied appeals, arguing that Lineco is not authorized to sue under section 502(e) of ERISA, 29 U.S.C. § 1132(e), and that Allied was not bound by the CBA until it executed the letter of consent.

II

Allied has asserted throughout this action that Lineco lacks standing to bring suit under 29 U.S.C. § 1132(e). What Allied means, however, is that Lineco lacks a right of action. In order to evaluate this argument, we must look to the statute. The obligation of employers to make contributions in accordance with the terms of a collectively-bargained agreement is found in section 1145. The parties authorized to bring suit under the statute are described in section 1132(a), (e); proper plaintiffs include participants, beneficiaries, or fiduciaries of a plan. This court has held that multiemployer plans are fiduciaries for the purposes of section 1132(e). *Auto. Mechs. Local 701 Welfare & Pension Funds v. Vanguard Car Rental USA, Inc.*, 502 F.3d 740, 744-45 (7th Cir. 2007). We reaffirm that holding today.

Section 1132(d)(1) establishes the legal status of multiemployer plans for purposes of ERISA: "An employee benefit plan may sue or be sued under this title as an entity." Section 1132(e), however, does not mention plans as such in the list of authorized plaintiffs. Instead, as we just noted, it grants a right of action to "fiduciaries of a plan." We must therefore determine who is a fiduciary of a plan and whether a plan itself may sue either as a fiduciary or on behalf of the fiduciaries. The first question is easy, because the statute addresses it. A person is a fiduciary "to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A).

Allied focuses on the second part of the inquiry and asserts that a plan cannot be a fiduciary of itself. In our view, however, this is too simplistic a view of a plan. Any and all actions taken by a plan are done by the administrators who act on its behalf—in other words, by the fiduciaries who exercise discretionary authority or control with respect to the management of a plan. Accord *Saramar Aluminum Co. v. Pension Plan,* 782 F.2d 577, 580-81 (6th Cir. 1986). But see *Local 159 v. Nor-Cal Plumbing, Inc.,* 185 F.3d 978, 981-84 (9th Cir. 1999) (holding that the court lacked subject-matter jurisdiction for a suit by an ERISA plan under section 1132(a)(3)); *Pressroom Unions-Printers League Income Sec. Fund v. Cont'l Assurance Co.,* 700

F.2d 889, 891-93 (2d Cir. 1983), *cert. denied,* 464 U.S. 845 (1983) (holding that the federal court lacked subject-matter jurisdiction under section 1132(e) for a suit brought by an ERISA plan). (The characterization of the issue in these cases as a problem of subject-matter jurisdiction is especially questionable in light of the Supreme Court's decision in *Union Pac. R. Co. v. Bhd. of Locomotive Eng'rs and Trainmen Gen. Comm. of Adjustment,* 130 S.Ct. 584, 596-97 (2009), which underscores the difference between issues relating to subject-matter jurisdiction and those relating to other claims-processing rules.)

Allied acknowledges that plans may sue under other provisions of ERISA and the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), such as 29 U.S.C. § 1381 (withdrawal liability) and 29 U.S.C. § 1109 (breach of fiduciary duty). See, *e.g., Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins. Co.,* 698 F.2d 320, 326 (7th Cir. 1983) (finding that a plan may bring suit for breach of a fiduciary duty pursuant to 29 U.S.C. §§ 1109(a), 1132(a)(2), (d)(1)). Allied notes that section 1109, for example, confers specific rights on plans (for example, the right to require another "to make good to such plan" for breach of a fiduciary duty) that are absent from section 1145, which imposes the substantive obligation that Lineco seeks to enforce. But this argument misapprehends the source of the right to sue under these provisions. It is section 1132, rather than sections 1109 and 1145, that grants to fiduciaries the right to sue to enforce substantive rights. If a plan is a fiduciary for the purposes of section 1132(a)(2) (enforcing section 1109), then a plan is a fiduciary for the purposes of section 1132(a)(3) (enforcing section 1145).

CBAs designate plans to collect ERISA contributions; Congress has provided that plans can sue and be sued, and that fiduciaries may enforce substantive rights, including those at issue in this case. We see no reason to deviate from our decision in *Vanguard Car Rental, supra,* and thus we confirm that a multiemployer plan may sue as a fiduciary under 29 U.S.C. § 1132(e).

III

We review decisions on cross motions for summary judgment *de novo*. *Rickher v. Home Depot, Inc.*, 535 F.3d 661, 664 (7th Cir. 2008). This case does not implicate any of the issues concerning standard of review that have been raised in recent cases involving denials of benefits. See *Metro. Life Ins. Co. v. Glenn*,128 S.Ct. 2343 (2008); *Fischer v. Liberty Life Assur. Co. of Boston*, 576 F.3d 369 (7th Cir 2009); *Krolnik v. Prudential Ins. Co. of America*, 570 F.3d 841 (7th Cir. 2009). Our job instead is to interpret and apply the governing agreements, which we approach *de novo*.

Allied concedes that it was required to make contributions for work done after it signed the letter of consent on December 7, 2006. Our holding that Lineco is entitled to bring suit to recover delinquent contributions under the CBA is enough to establish that Allied must pay Lineco for obligations incurred after that date—that is, for most of December 2006 and all of January and February 2007. Whether Allied also owes Lineco for delinquent payments from July, August, and early December 2006 requires additional analysis.

We begin with the question whether Allied was bound by the CBA before December 7, 2006. "[A] signature to a collective bargaining agreement is not a prerequisite to finding an employer bound to that agreement." *Bricklayers Local 21 of Ill. Apprenticeship & Training Program v. Banner Restoration,* 385 F.3d 761, 767 (7th Cir. 2004). Assent can also be established through other evidence, including most importantly conduct manifesting agreement, such as "the payment of union wages, the remission of union dues, the payment of fringe benefit contributions, the existence of other agreements evidencing assent and the submission of the employer to union jurisdiction, such as that created by grievance procedures." *Id.* at 766 (citing cases). (We note in passing that dues checkoffs are permissible under the National Labor Relations Act only if the employer is bound by a collective bargaining agreement. See 29 U.S.C. § 186(c)(4); *U.S. Can Co. v. NLRB,* 984 F.2d 864, 869 (7th Cir. 1993). If Allied was collecting union dues during this time period, that is strong evidence that it was party to the CBA. Without a CBA, such collections are illegal.)

According to a contribution table provided by Lineco, Allied had made contributions to the fund since 1993. The table also reveals that Allied's payment rate jumped from $4.50 per hour to $4.75 per hour—as required by the 2005 CBA—at the time when the new CBA took effect. Allied continued to make contributions according to the CBA except for the months at issue in this case. Allied's President, Michael Eskridge, admitted at his deposition that the company issued contribution reports to Lineco the "majority of months." This undisputed course of events manifests assent to the 2005 CBA.

In October 2006, the Union barred Eskridge from a NECA-Union negotiation because Allied had not signed a letter of consent. Allied believes that this incident shows that the Union did not believe that Allied was bound to the CBA: as Allied sees things, it was barred from one benefit of the arrangement (a seat at the table), and thus it should not incur any burdens. But this incident was peripheral, at best, to the contribution dispute. In fact, it suggests that Allied recognized its interest in the CBA, and maybe even assumed that it was a party through its NECA membership. When Allied learned that it had not complied with a procedural requirement, it remedied that omission with a form letter shortly thereafter. Moreover, our holding in *Central States Pension Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1148 (7th Cir. 1989) (*en banc*), demonstrates that even if the Union had sent Allied a letter stating that it was not covered by the CBA until it affixed an authorized signature, such a letter would not be conclusive on an ERISA plan.

Allied also argues that the CBA's explicit requirement of a letter of consent should preclude the court from holding it bound by the agreement until it issued such a letter. See *Merrimen v. Paul F. Rost Electric, Inc.*, 861 F.2d 135 (6th Cir. 1988) (finding no obligation where the employer did not sign a letter of assent as required by the CBA). We have not taken such a formalistic position. Instead, we have held repeatedly that conduct manifesting assent creates an obligation; a contrary rule would ignore commercial realities and would create a loophole for parties seeking to escape responsibilities that they have acknowledged through their behavior.

The LMRA does not excuse Allied's delinquencies either. The LMRA provides that employers may not make payments to employee benefit funds unless those contributions are specified in a written agreement. 29 U.S.C. § 186(c)(5)(B). This court has read this requirement literally. As long as the agreement is written, it does not have to be "a signed, unexpired collective bargaining agreement between the parties," see *Gariup v. Birchler Ceiling & Interior Co.*, 777 F.2d 370, 375 (7th Cir. 1985), or even a signed agreement at all. See *Bricklayers*, 385 F.3d at 770 ("[T]he existence of a 'written agreement,' albeit an unsigned one, detailing the terms upon which the fringe benefit contributions were to be made, and [employer's] payment of contributions in accordance with that agreement, effectively concludes our inquiry."). Here, the CBA serves as the written agreement, and it is enough for the LMRA. (This actually may be good news for Allied; otherwise all of its other contributions under the 2005 CBA would have been improper.) Therefore, Allied cannot use the LMRA to escape its obligations incurred prior to December 7, 2006.

Lineco properly brought suit under ERISA and is entitled to the delinquent contributions for July, August, and December 2006, and January and February 2007. The decision of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

[SEAL]

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

FINAL JUDGMENT

January 8, 2010

BEFORE:

RICHARD D. CUDAHY, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

JOHN DANIEL TINDER, *Circuit Judge*

No.: 09-1546	LINE CONSTRUCTION BENEFIT FUND A HEALTH AND WELFARE FUND, Plaintiff - Appellee v. ALLIED ELECTRICAL CONTRACTORS INCORPORATED, a Tennessee Corporation, Defendant - Appellant

Originating Case Information:
District Court No: 1:07-cv-00950 Northern District of Illinois, Eastern Division District Judge Rebecca R. Pallmeyer

The judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date.

form name: **c7_FinalJudgment** (form ID: **132**)

APPENDIX B

AO 450(Rev. 5/85)Judgment in a Civil Case

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

Case Number 07 C 950

[Filed January 29, 2009]

Line Construction Benefit Fund, et al	)
	)
v	)
	)
Allied Electrical Contractors, Inc.	)
	)

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Judgment is entered in favor of Plaintiff and against Defendant in the amount of $200,816.36.

Michael W. Dobbins, Clerk of Court

Date: 1/29/2009

/s/ Ena T. Ventura, Deputy Clerk

APPENDIX C

Order Form (01/2005)

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Rebecca R. Pallmeyer	**Sitting Judge if Other than Assigned Judge**	
CASE NUMBER	07 C 950	**DATE**	1/29/2009
CASE TITLE	Line Construction Benefit Fund, a Health and Welfare Fund vs. Allied Electrical Contractors, Inc.		

DOCKET ENTRY TEXT

On November 26, 2008, the court granted Plaintiff's motion for summary judgment in its favor on the issue of liability. Plaintiff has now moved for judgment in an amount certain. In its response to the motion, Defendant has not challenged Plaintiff's calculations of the amounts owed. Instead, Defendant argues only that Plaintiff lacks standing to bring this action and that Defendant is not bound by the collective bargaining agreement Plaintiff seeks to enforce. These arguments were made, and rejected, on summary

judgment, and the court concludes they are reasserted here to preserve the matters for appeal.

Defendant's objections are overruled for the same reasons stated in the court's November 26, 2008 Memorandum Opinion. Plaintiff's motion (52) is granted. Reply date of 2/11/2009 and ruling date of 2/19/2009 are stricken. Judgment is entered in favor of Plaintiff and against Defendant in the amount of $200,816.36.

/s/Rebecca R. Pallmeyer

Notices mailed by Judicial staff.
*Mail AO 450 form.

Courtroom Deputy Initials:	ETV

07C950 Line Construction Benefit Fund, a Health and Welfare Fund vs. Allied Electrical Contractors, Inc.

APPENDIX D

7NITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 07 C 950
Judge Rebecca R. Pallmeyer

[Filed November 26, 2008]

LINE CONSTRUCTION BENEFIT FUND, A HEALTH AND WELFARE FUND,	)
Plaintiff,	)
v.	)
ALLIED ELECTRICAL CONTRACTORS, INC., A Tennessee Corporation,	)
Defendant.	)

MEMORANDUM OPINION AND ORDER

Plaintiff Line Construction Benefit Fund, a Health and Welfare Fund ("Lineco" or "Fund") administers the coverage for medical and drug expenses incurred by certain union members employed by Defendant Allied Electrical Contractors, Inc. ("Allied"). Lineco brings suit under Sections 502(a)(3), (g)(2), and 515 of the Employee Retirement Income Security Act of 1974

("ERISA"), 29 U.S.C. §§ 1132(a)(3), (g)(2), and § 1145, claiming that Allied owes Lineco delinquent contribution payments for the months of July, August, and December 2006, and January and February 2007.

Defendant moves to dismiss this action on grounds of Plaintiff's lack of standing. In the alternative, Defendant moves for partial summary judgment, arguing that it was not bound by the terms of the Collective Bargaining Agreement during all the time periods at issue, and Plaintiff moves for summary judgment in its favor on that issue. For the reasons stated below, this court grants Plaintiff's motion for summary judgment.

FACTS[1]

Plaintiff Lineco is a multiemployer employee benefits fund located in Illinois that receives contributions from employers pursuant to collective bargaining agreements negotiated between employers and unions. (Plaintiff's Complaint ("Pl.'s Compl.") ¶¶ 3, 4.) Lineco is administered in accordance with Section 302(c)(5) of the Labor Management Relations Act

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[1] The facts presented here are drawn from the parties' Local Rule 56.1 Statements: Defendant's Statement of Undisputed Facts in Support of its Motion for Partial Summary Judgment ("Def.'s 56.1 [27]"); Plaintiff's Statement of Undisputed Facts in Support of Plaintiff's Amended Motion for Summary Judgment and Plaintiff's Response to Defendant's Statement of Undisputed Facts ("Pl.'s 56.1 [42]"); Defendant's Response to Plaintiff's Statement of Undisputed Facts in Support of Plaintiff's Amended Motion for Summary Judgment ("Def.'s 56.1 Resp. [43]"); Plaintiff's Reply to Defendant's Response to Plaintiff's Statement of Undisputed Facts in Support of Plaintiff's Amended Motion for Summary Judgement ("Pl.'s Reply [45]").

("LMRA") as well as the Employee Retirement Income Security Act of 1974 ("ERISA"). (Def.'s 56.1 [27] ¶ 1.)

In 2005, the Southeastern Line Constructors Chapter of the National Electrical Contractors Association ("NECA") and the International Brotherhood of Electrical Workers, Local Union 474 ("IBEW/Local 474") entered into a collective bargaining agreement ("the CBA") detailing the terms under which the Lineco Fund receives contributions pursuant to the Trust Agreement that established the Fund. (Pl.'s 56.1 [42] ¶ 1; Def.'s Resp. [43] ¶ 1.) Specifically, the CBA requires employers to pay into the Lineco Fund the sum of $4.75 per hour for each hour worked for the Employer by all employees covered by the CBA. (Def.'s 56.1 [27] ¶ 6.) The CBA further provides that "[i]t shall apply to all firms who sign a Letter of Assent to be bound by the terms of this Agreement." (Def.'s 56.1 [27] ¶¶ 4-5.)

Defendant Allied Electrical Contractors, Inc. ("Allied") is a Tennessee corporation that provides electrical contracting services in Tennessee and on occasion in other states not specified by either party. (Def.'s 56.1 [27] ¶ 2; Eskridge Dep. 9:13-10:2, Amended Ex. C [48] to Pl.'s 56.1 [42].) Its President is Michael Eskridge, a Tennessee resident. (Def.'s 56.1 [27] ¶ 2; Eskridge Dep. 6:16-17, Amended Ex. C [48] to Pl.'s 56.1 [42].) Allied has been a member of the NECA since about November 2002. (Def.'s 56.1 [27] ¶¶ 2-3, Amended Ex. C [48] to Pl.'s 56.1 [42].) Allied's NECA Application for Membership, signed August 28, 2002, does not mention a collective bargaining agreement or a benefit plan, nor does it bind the applicant to the terms of either a collective bargaining agreement or a benefit plan agreement. (Def.'s 56.1 [27] ¶¶ 10-11;

Pl.'s Resp. [42] ¶¶ 10-11.) In his deposition, however, Mr. Eskridge acknowledged the NECA's role in collective bargaining on behalf of its members; he stated, "when you're a member of NECA, NECA negotiates the contracts." (Eskridge Dep. 14:25-15:4, Amended Ex. C [48] to Pl.'s 56.1 [42].) In addition, the letter accompanying Defendant's application for membership in the NECA, signed and dated by Mr. Eskridge on August 28, 2002, stated that one of Defendant's goals in joining the NECA was to become involved in the negotiating committee. (Def.'s 56.1 [27] ¶¶ 8, 12; Letter Accompanying Defendant's Application for member, Ex. G. to Def.'s 56.1 [27].)

Around October 2006, Eskridge did attend a negotiation session between the National Electrical Contractor's Association ("NECA") and IBEW/Local 474, but was informed that his failure to sign a Letter of Assent to the CBA made him ineligible to participate in the negotiations.[2] (Def.'s 56.1 [27] ¶¶ 8-9.) Two months later, on December 7, 2006, Defendant did execute a Letter of Assent to be bound by the CBA. (Def.'s 56.1 [27] ¶ 7.) In that letter, Allied authorized the NECA to represent Allied in all collective bargaining matters and agreed "to comply with, and be bound by, all of the provisions contained in said current and subsequent approved labor agreements." (Letter of Assent, Ex. E to Def.'s 56.1 [27]; Pl.'s Compl. ¶ 7.) Under the Letter's own terms, it became effective on December 7, 2006 and remains in effect until NECA and IBEW/Local 474 receive written notice of termination from Allied at least 150

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[2] Neither party has provided the date on which this negotiation session occurred.

days prior to the anniversary date of the current approved labor agreement. (Letter of Assent, Ex. E to Def.'s 56.1 [27].)

It is undisputed that Defendant did not submit contribution reports and payments to Lineco pursuant to the CBA for the months of July, August, and December 2006, nor for January and February 2007.[3] (Pl.'s 56.1 [42] ¶ 2; Def.'s Resp. [43] ¶ 2.) Defendant admits that it employed members of IBEW/Local 474 covered by the CBA before December 7, 2006, when Eskridge signed the Letter of Assent. (Eskridge Dep. 12:4-7, Amended Ex. C [48] to Pl.'s 56.1 [42].) Defendant further admits that it made monthly contribution payments to the Lineco fund before becoming a member of NECA. Defendant began making payments as early as 1993 and continued to do so through February 15, 2008, with the exception of July, August, and December 2006, and January and February 2007. (Pl.'s 56.1 [42] ¶ 7; Eskridge Dep. 23:2-7, Amended Ex. C [48] to Pl.'s 56.1 [42].) During 2006, Eskridge signed at least one of the contribution payment checks to Lineco, dated June 15, 2006. (Cancelled Check, Ex. C1-3 to Pl.'s 56.1 [42].) There is no evidence that Allied ever sought to withdraw from

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[3] The record is not clear as to whether Allied submitted contribution reports alone without payment, or nothing at all. Plaintiff has provided conflicting statements, at one point stating that the contribution reports were submitted without the corresponding payments, and later stating that Allied did not provide the contribution reports or the payments. (Plaintiff's Answers to Defendant's First Set of Interrogatories ¶ 5; Pl.'s 56.1[42] ¶ 2.)

NECA prior to the filing of this lawsuit.[4] (Eskridge Dep. 18:21-10, Amended Ex. C [48] to Pl.'s 56.1 [42].)

Plaintiff alleges that, pursuant to the CBA and the Trust Agreement, Defendant owes the Lineco Fund a total of $138,605.25 in delinquent payments for July, August, and December 2006 and for January and February 2007. (Def.'s 56.1 Resp. [43] ¶ 3.) Plaintiff seeks summary judgment in its favor on those claims. Defendants contends that it does not owe payments for July, August, and December 2006 because it did not sign the Letter of Assent required by the CBA until December 7, 2006. (*Id.*) Defendant moves to dismiss the complaint on the ground that Plaintiff lacks standing and, in the alternative, for partial summary judgment as to whether Defendant owes contributions to the Lineco Fund for periods predating December 7, 2006.

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[4] The record is unclear on when Defendant communicated an intent to withdraw from the fund, if ever. According to Eskridge, Defendant only indicated an intent to withdraw "when it was discovered that we had not signed a letter of assent." (Eskridge Dep. 23:8-17, Amended Ex. C [48] to Pl.'s 56.1 [42].) Eskridge does not say when this fact first came to his attention, though it may have been when he was turned away from the negotiation session between NECA and IBEW/Local 474 in October 2006. In any event, Defendant has not produced any evidence of an intent to withdraw from the fund other than Defendant's sporadic missed payments in 2006 and early 2007.

DISCUSSION

I. Standing

Defendant Allied has moved to dismiss this action pursuant to FED. R. CIV. P. 12(b)(1), contending that as a health and welfare fund, Lineco lacks standing to bring suit under ERISA. Defendant argues that Plaintiff is not a fiduciary under ERISA and that this court must therefore dismiss the complaint for lack of subject matter jurisdiction. In ruling on a motion to dismiss for lack of standing, the court accepts the allegations in the complaint as true and draws all reasonable inferences in the plaintiff's favor. *Lee v. City of Chicago*, 330 F.3d 456, 468 (7th Cir. 2003).

Section 502(a)(3) of ERISA grants "a participant, beneficiary, or fiduciary" standing to enforce any ERISA provisions.[5] 29 U.S.C.A. § 1002(21)(A). In a separate subsection, it also states that "an employee

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[5] ERISA defines a "fiduciary" as follows:

> Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title. 29 U.S.C.A. § 1002(21)(A).

benefit plan may sue or be sued under this under this subchapter as an entity." 29 U.S.C. § 1132(d)(1). Finally, 29 U.S.C. § 1132(e)(1) states, "the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary . . . ." 29 U.S.C. § 1132(e)(1).

Defendant contends that Plaintiff, a plan rather than a group of trustees, lacks standing to bring an action for unpaid contributions. Defendant's argument rests in part on a split in authority among the circuits as to whether a plan itself is a fiduciary within the meaning of ERISA. For example, the Sixth Circuit held that a plan has standing to bring a counterclaim for collection of unpaid contributions because "[t]he Plan, as a party before the court, necessarily includes those who must act for the Plan to administer it and to effectuate its policies." *Saramar Aluminum Co. v. Pension Plan for Employees of Aluminum Industry and Allied Indus. of Youngstown Ohio Metro. Area*, 782 F.2d 577, 581 (6th Cir. 1986). By contrast, the Ninth Circuit distinguishes plans from their fiduciaries, reasoning that a fund cannot be a fiduciary of itself. *Local 159, 342, 343 & 444 v. Nor-Cal Plumbing, Inc.*, 185 F.3d 978, 981 (9th Cir. 1999). In *Nor-Cal Plumbing*, the court recognized that a trust fund "could qualify as a fiduciary of a separate ERISA plan so long as it exercises discretionary authority over the management or administration of the plan or its assets." *Id.* at 982. The trust fund in that case, however, did not have standing to sue because it was not a separate entity from the plan itself. *Id.* (noting that "the Trust Agreement and the Trust Funds' complaint treat them as one and the same"). The Second Circuit, similarly, employs a strict textualist

approach, interpreting the language of the statute as not explicitly authorizing pension funds to assert a cause of action for breach of fiduciary duty and denying standing on that ground. *Pressroom Unions-Printers League Income Sec. Fund v. Continental Assur. Co.*, 700 F.2d 889, 891 (2d Cir. 1983) (denying pension fund standing to sue under ERISA for breach of fiduciary duty by defendant insurance companies that allegedly charged excessive premium payments and fees to the fund).

Defendant argues that, while there is no explicit holding from the Seventh Circuit, a note in *Winstead v. J.C. Penney Co., Inc.*, 933 F.2d 576 (7th Cir. 1991) suggests that the Seventh Circuit would follow the lead of *Nor-Cal* and *Pressroom*. In *Winstead*, the trustees of one benefit plan sought a declaratory judgment that another plan was liable for certain medical expenses. Because the court found that "trustees of the . . . plan are indisputably ERISA fiduciaries," it did not have to address the issue of whether a plan itself could bring suit as a fiduciary under ERISA. *Id.* at 579. The court did, however, note the following in dictum:

> As a detail we note that, as far as appears, the cross-claim in [a related lawsuit] has been brought by the [defendant] plan itself, not by its trustees. An ERISA plan can sue and be sued, 29 U.S.C. § 1132(d)(1), but it is doubtful, as noted earlier, that it can sue under a provision that confers a right of action on a fiduciary.

Id. at 581. Citing this comment in *Winstead*, Defendant urges the court to adopt the Ninth and Second Circuits' approaches and deny standing to

benefit funds, including Plaintiff here. (Defs.' Mem. at 2-3)

In other decisions, however, the Seventh Circuit has recognized a benefits plan's right to sue under ERISA for breach of fiduciary duty and to recover delinquent contributions. For example, in *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins. Co.*, 698 F.2d 320 (7th Cir. 1983), the central issue was whether a defendant insurer was a fiduciary under ERISA where a pension plan's trustees had "turned over the assets of the pension plan to [defendant] to manage with full investment discretion," but the court explicitly acknowledged that "the participants, the trustees, and the plan itself" all had standing to sue under 29 U.S.C. 1132(a)(2), (d)(1) for breach of fiduciary duty. *Id.* at 327 ("It is true . . . that ERISA confers on pension plans standing to sue for breach of fiduciary obligations under ERISA . . . ."). *Id.* at 326. And, in a post-*Winstead* decision, the Seventh Circuit explicitly recognized the standing of multiemployer plans to sue under ERISA for delinquent contributions. *See Central States, Southeast and Southwest Areas Pension Fund v. Schilli Corporation,* 420 F.3d 663 (7th Cir. 2005). In *Central States*, a pension plan brought suit to vacate the decision by an arbitrator that defendant employer was not subject to withdrawal liability under the MPPAA. *Id.* at 670. In discussing who had standing to sue, the court recognized that "the MPPAA authorizes multiemployer plans to sue for delinquent contributions owed 'under the terms of the plan or under the terms of a collectively bargained agreement.'" (citing 29 U.S.C.A. § 1145 and 1132(d)(1).) *Id. See also Milwaukee Carpenter's Dist. Council Health Fund v. Philip Morris, Inc.*, 70 F. Supp.

2d 888 (E.D. Wis.1999) (holding that ERISA plan's trustees had standing to sue, but suggesting in passing that the plan itself would be no less a fiduciary than its trustees so long as it exercised "substantial control over the plan's own assets, management and administration").

At least one district court in this circuit has suggested that the proper plaintiffs in an action under ERISA for delinquent contribution payments are trustees or other designated administrators of a benefits plan, and not the plan itself. *See Laborers' Pension Fund v. Leopardo Const., Inc.*, 139 F.R.D. 634, 635-36 (N.D. Ill. 1991) (granting plaintiff pension funds leave to amend the complaint in an action for delinquent payments in order to name the fund administrator [the fund's actual fiduciary] as plaintiff.) Even in that case, however, the court did not rule on the issue of whether the plaintiff plans had standing to sue under ERISA and Section 301 of the Labor-Management Relations Act. *Id.* at 635. Rather, the plaintiffs on their own initiative filed leave to amend the complaint naming its trustees as plaintiffs, and the court granted the motion over defendant's objection that the court lacked subject matter jurisdiction to do so.

This court concludes that a pension plan has standing to sue for delinquent payments under ERISA. The court hereby denies Defendant's motion to dismiss on this ground is denied.

II. Summary Judgment

A. Defendant's Motion for Summary Judgment

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits, show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The parties have filed cross-motions for summary judgment on the issue of whether Allied is obligated to make delinquent contribution fund payments. Plaintiff argues that the CBA bound Defendant to make monthly contributions to the Fund even before Defendant formally signed the Letter of Assent on December 7, 2006, and that Defendant is therefore delinquent for the months of July, August and December 2006 and for January and February 2007. In response, Defendant contends that it became bound by the terms of the CBA only after signing the Letter of Assent and thus had no obligation to make contributions to the Fund prior to December 7, 2006. For the reasons stated below, this court grants Plaintiff's motion for partial summary judgment, and denies Defendant's cross-motion for summary judgment.

Section 302(a) of the LMRA prohibits employers from making payments to representatives of employees unless the payments fall within narrow statutory exceptions. 29 U.S.C. § 186(a). One exception permits an employer to contribute to a trust fund established for the benefit of employees so long as the obligation to contribute is specified in a written

agreement: Section 302(c)(5)(B) of the LMRA provides that an employer's obligation to make contributions to a multiemployer fund is unenforceable unless that obligation is imposed by a written agreement with the employer. 29 U.S.C. § 186(c)(5)(B). The agreement need not be signed to satisfy the "written agreement" requirement. It need only set forth "a detailed basis on which payments are to be made to a trust fund." *Id.*; *Bricklayers Local 21 of Ill. Apprenticeship & Training Program v. Banner Restoration*, 385 F.3d 761, 770 (7th Cir. 2004) (quoting *Brown v. C. Volante Corp.*, 194 F.3d 351, 355 (2d Cir.1999))

The CBA is a written agreement within the meaning of § 302(c)(5)(B), adequately detailing the terms of payment between employers and Plaintiff. (Def.'s 56.1 [27] Stmt. ¶¶ 5-6.) At issue is when Allied became bound by that agreement. In the Seventh Circuit, a party may be bound by an agreement satisfying § 302(c)(5)(B) in either of two ways–through express assent to be bound by the agreement's terms or through conduct manifesting such assent. *Bricklayers Local 21*, 385 F.3d at 766. Courts generally "require some sort of *signed* agreement with an employer evincing an intent by the employer either to contribute to the funds or to be bound by a written collective bargaining agreement that itself provides for contribution to the funds." *Moriarty, on Behalf of Trustees Local Union No. 727 v. Brust Funeral Home, Ltd.*, No. 95 C 333, 1995 WL 472771, at *5 (N.D. Ill. Aug. 8, 1995) (emphasis original); *cf. Bricklayers*, 385 F.3d at 770 (noting that even an expired agreement may be enough to satisfy 302(c)(5)(B) where conduct shows continued intent to be bound). A signed agreement is not an absolute requirement, however, and "an employer may adopt a collective bargaining

agreement by its actions or by a course of conduct that demonstrates an intent to abide and be bound by the terms of such an agreement." *Advance Cast Stone Co. v. Bridge, Structural and Reinforcing Iron Workers*, No. 01 C 2758, 2002 WL 31163757, at * 6 (N.D. Ill. 2002) (citing *U.S. Can Company v. NLRB*, 984 F.2d 864, 870 (7th Cir. 1993); *Robbins v. Lynch*, 836 F.2d 330, 332 (7th Cir. 1988)).

Intent to be bound may be inferred where the party signs or otherwise assents to be bound by a written agreement that references an outside agreement, such as a collective bargaining agreement, or that recites the terms of such an agreement. *See Gariup v. Birchler Ceiling & Interior Co.*, 777 F.2d 370, 375 (7th Cir. 1985) (holding that "any combination" of "a written trust agreement, written collective bargaining agreements detailing the amount to be contributed to the Fund . . ., a written and signed Assent of Participation form and a completed yet unsigned Acceptance of Working Agreement form" was sufficient to satisfy § 302(c)(5)(B)). Plaintiff argues that Defendant's membership in the NECA is enough by itself to bind Defendant to the terms of the CBA. (Pl.'s Mem. in Supp. of Its Mot. for Summ. J. [41] at 2.) Notably, however, Defendant's membership application to the NECA makes no mention of the CBA or any other benefit plan (Def.'s 56.1 [27] ¶¶ 10-11), nor has Plaintiff presented any other document or agreement signed by Defendant referencing the CBA or its terms. Because application for and acceptance of membership in the NECA does not require the applicant to assent to the terms of the CBA, the court is not persuaded that NECA membership alone is sufficient to bind Plaintiff to the CBA.

A party's course of conduct may, nonetheless, manifest assent to a collective bargaining agreement in satisfaction of the terms of § 302(c)(5)(B). *Bricklayers*, 385 F.3d at 770-71; *Gariup*, 777 F.2d at 376. Factors courts have considered in determining whether an employer's conduct manifests an intent to be bound by a collective bargaining agreement include "the payment of union wages, the remission of union dues, the payment of fringe benefit contributions, the existence of other agreements evidencing assent and the submission of the employer to union jurisdiction, such as that created by grievance proceedings." *Bricklayers*, 385 F.3d at 769 (citing cases). In *Bricklayers*, the court noted the existence of an unsigned, written agreement detailing terms of fringe benefit contributions. Defendant had made monthly contributions over a period of seven years, submitting contribution reports that specifically referenced the terms of the collective bargaining agreement. 385 F.3d at 771. There circumstances were sufficient, in the Seventh Circuit's view, to bind the employer to the terms of the agreement. (*Id.*) Similarly, in *Advance Cast Stone*, the employer protested that it was not bound because it had never received or signed the Principal Agreement containing the full terms of the collective bargaining agreement. 2002 WL 31163757, at *6. It did sign a Short Form Agreement with the defendants that "neither referred to nor incorporated the Principal Agreement" and terminated that agreement before the time period at issue. *Id.* This court nonetheless concluded that the employer bound itself to the Principal Agreement through its course of conduct, namely by consistently performing under the Principal Agreement's terms, including terms not mentioned in the Short Form Agreement.

As noted by Defendant, courts have been reluctant to infer intent to be bound where an agreement is unsigned and where the employer has exhibited minimal or no conduct manifesting assent. *Id.* at n.8 (discussing cases); *see also Firesheets v. A.G. Bldg. Specialists, Inc.*, 134 F.3d 729 (5th Cir. 1998) (benefit fund contribution payments not sufficient to show intent to be bound where defendant's other actions were inconsistent with the existence of a collective bargaining agreement). Allied's conduct here, however, evidences repeated compliance with the terms of the CBA beyond what would be considered a "minimal" manifestation of assent. Defendant's membership in the NECA has been continuous since 2002, and Defendant acknowledges that the NECA has authority to negotiate collective bargaining agreements with unions on Defendant's behalf. (Def.'s 56.1 [27] ¶ 3; Eskridge Dep. 14:25-15:4, Amended Ex. C [48] to Pl.'s 56.1 [42].) Most significantly, Defendant admits that it submitted monthly contribution reports and payments in accordance with the terms of the current CBA prior to signing the Letter of Assent in December 2006, with the unchallenged exceptions of July, August and December 2006. (Pl.'s 56.1 [42] ¶ 7; Eskridge Dep. 19:18-27:18, Amended Ex. C [48] to Pl.'s 56.1 [42].) Defendant's professed awareness of the CBA's terms and its compliance therewith through the repeated submission of contribution reports and payments to Plaintiff is sufficient to meet the standard articulated in *Bricklayers*. The CBA constitutes a "written agreement" within the meaning of 302(c)(5)(B), and Defendant's conduct in accordance with that agreement manifests assent to be bound. *Bricklayers*, 385 F.3d at 771-72. The court holds that Defendant was bound by the CBA before signing the Letter of Assent on December 7, 2007.

CONCLUSION

Defendant's motion to dismiss and for summary judgment [25] is denied. Plaintiff's motions for partial summary judgment [30, 40] are granted.

Dated: November 25, 2008

ENTER:

/s/
REBECCA R. PALLMEYER
United States District Judge

APPENDIX E

Order Form (01/2005)

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Rebecca R. Pallmeyer	**Sitting Judge if Other than Assigned Judge**	
CASE NUMBER	07 C 950	**DATE**	11/26/2008
CASE TITLE	Line Construction Benefit Fund, a Health and Welfare Fund vs. Allied Electrical Contractors		

DOCKET ENTRY TEXT

Enter Memorandum Opinion And order. Defendant's motion to dismiss and for summary judgment [25] is denied. Plaintiff's motions for partial summary judgment [30, 40] are granted. Status hearing set for 12/10/2008 at 9:00.

■ [For further detail see separate order(s).]

Notices mailed by Judicial staff.

Courtroom Deputy Initials:	ETV

07C950 Line Construction Benefit Fund, a Health and Welfare Fund vs. Allied Electrical Contractors, Inc.

APPENDIX F

29 U.S.C. § 186. Restrictions on financial transactions

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain

collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

* * *

(c) Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such

deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has

its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, (B) child care centers for preschool and school age dependents of employees, or (C) financial assistance for employee housing: *Provided,* That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and

dependents for counsel or plan of their choice: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further,* That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.]; or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

* * *

29 U.S.C. § 1002. Definitions

For purposes of this subchapter:

* * *

(9) The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

* * *

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

* * *

29 U.S.C. § 1102. Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or

(B) by such an employer and such an employee organization acting jointly.

* * *

29 U.S.C. § 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such

documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

(1)(A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)--

(i) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control, except that this clause shall not apply in connection with such participant or beneficiary for any blackout period during which the ability of such participant or beneficiary to direct the investment of the assets in his or her account is suspended by a plan sponsor or fiduciary.

(B) If a person referred to in subparagraph (A)(ii) meets the requirements of this subchapter in connection with authorizing and implementing the blackout period, any person who is otherwise a fiduciary shall not be liable under this subchapter for any loss occurring during such period.

(C) For purposes of this paragraph, the term "blackout period" has the meaning given such term by section 1021(i)(7) of this title.

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of Title 26, a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of--

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 1021(g) of this title, shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

(3) In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of the Internal Revenue Code of 1986, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon--

(A) the earlier of--

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity; or

(ii) one year after the transfer is made; or

(B) a transfer that is made in a manner consistent with guidance provided by the Secretary.

(4)(A) In any case in which a qualified change in investment options occurs in connection with an individual account plan, a participant or

beneficiary shall not be treated for purposes of paragraph (1) as not exercising control over the assets in his account in connection with such change if the requirements of subparagraph (C) are met in connection with such change.

(B) For purposes of subparagraph (A), the term "qualified change in investment options" means, in connection with an individual account plan, a change in the investment options offered to the participant or beneficiary under the terms of the plan, under which--

(i) the account of the participant or beneficiary is reallocated among one or more remaining or new investment options which are offered in lieu of one or more investment options offered immediately prior to the effective date of the change, and

(ii) the stated characteristics of the remaining or new investment options provided under clause (i), including characteristics relating to risk and rate of return, are, as of immediately after the change, reasonably similar to those of the existing investment options as of immediately before the change.

(C) The requirements of this subparagraph are met in connection with a qualified change in investment options if--

(i) at least 30 days and no more than 60 days prior to the effective date of the change, the plan administrator furnishes written

notice of the change to the participants and beneficiaries, including information comparing the existing and new investment options and an explanation that, in the absence of affirmative investment instructions from the participant or beneficiary to the contrary, the account of the participant or beneficiary will be invested in the manner described in subparagraph (B),

(ii) the participant or beneficiary has not provided to the plan administrator, in advance of the effective date of the change, affirmative investment instructions contrary to the change, and

(iii) the investments under the plan of the participant or beneficiary as in effect immediately prior to the effective date of the change were the product of the exercise by such participant or beneficiary of control over the assets of the account within the meaning of paragraph (1).

(5) Default investment arrangements

(A) In general

For purposes of paragraph (1), a participant or beneficiary in an individual account plan meeting the notice requirements of subparagraph (B) shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant or

beneficiary, are invested by the plan in accordance with regulations prescribed by the Secretary. The regulations under this subparagraph shall provide guidance on the appropriateness of designating default investments that include a mix of asset classes consistent with capital preservation or long-term capital appreciation, or a blend of both.

(B) Notice requirements

(i) In general

The requirements of this subparagraph are met if each participant or beneficiary--

(I) receives, within a reasonable period of time before each plan year, a notice explaining the employee's right under the plan to designate how contributions and earnings will be invested and explaining how, in the absence of any investment election by the participant or beneficiary, such contributions and earnings will be invested, and

(II) has a reasonable period of time after receipt of such notice and before the beginning of the plan year to make such designation.

(ii) Form of notice

The requirements of clauses (i) and (ii) of section 401(k)(12)(D) of Title 26 shall apply with respect to the notices described in this subparagraph.

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of Title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III of this chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement--

(i) under section 4980(d)(2)(B) of Title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of Title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement--

(i) under section 4980(d)(2)(A) of Title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of Title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of Title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection–

(A) any term used in this subsection which is also used in section 4980(d) of Title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to Title 26 shall be a reference to Title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

29 U.S.C. § 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach

was committed before he became a fiduciary or after he ceased to be a fiduciary.

29 U.S.C.§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought--

* * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * *

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify

the administrator or any trustee of the plan of receipt of such service.

* * *

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

* * *

29 U.S.C. § 1145. Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.